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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 JENNIFER LEE LONG,

11 Plaintiff,

12 v.

13 MICHAEL J. ASTRUE, Commissioner  
14 of the Social Security Administration,

15 Defendant.

CASE NO. 11cv5746-RBL-JRC

REPORT AND  
RECOMMENDATION ON  
PLAINTIFF'S COMPLAINT

NOTING DATE: June 15, 2012

16 This matter has been referred to United States Magistrate Judge J. Richard  
17 Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR  
18 4(a)(4), and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261,  
19 271-72 (1976). This matter has been fully briefed (see ECF Nos. 11, 12, 13).  
20

21 The ALJ in this matter did not commit harmful error when he found that plaintiff's  
22 left humeral malformation was not a severe impairment. Although the ALJ committed  
23 harmless error during this determination, plaintiff has not demonstrated that any  
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1 functional limitation was rejected improperly by the ALJ when making the determination  
2 regarding plaintiff's residual functional capacity or that any subsequent step in the  
3 sequential disability evaluation process was not supported by substantial evidence in the  
4 record as a whole. Therefore, this matter should be affirmed pursuant to sentence four of  
5 42 U.S.C. § 405(g).

### 6 BACKGROUND

7 Plaintiff, JENNIFER LEE LONG, was twenty-two years old on her alleged date of  
8 disability onset of January 10, 2007 (Tr. 15, 138). Plaintiff has at least a high school  
9 education (see Tr. 24). Between 2002 and 2006, she worked for Godfather's Pizza,  
10 Victoria's Secret/The Limited, and Jamba Juice (see Tr. 145-47). However, plaintiff did  
11 not work full time, and with reference to her application for supplemental security  
12 income, she had "no past relevant work" (Tr. 24).

14 Plaintiff "was involved in a motor vehicle accident in January 2007 in which her  
15 discs from T11 through L2 were fractured" and her left arm was broken (Tr. 18). Plaintiff  
16 "underwent spinal fusion surgery of these discs with metal hardware" (id.). Plaintiff also  
17 suffered from a severe (MRSA) infection requiring three or four subsequent operations  
18 (Tr. 428).

### 19 PROCEDURAL HISTORY

20 Plaintiff protectively filed an application for supplemental security income on  
21 November 19, 2008 (Tr. 15, 138-44). Her application was denied initially and following  
22 reconsideration (Tr. 55-58, 62-63). Plaintiff's requested hearing was held before  
23 Administrative Law Judge Verrell Dethloff ("the ALJ") on August 13, 2010 (Tr. 31-52).  
24

1 On September 21, 2010, the ALJ issued a written decision denying plaintiff's application,  
2 finding that plaintiff had the severe impairment of "status-post lumbar fusion" but was  
3 not disabled pursuant to the Social Security Act (Tr. 12-26).

4 On July 15, 2011, the Appeals Council denied plaintiff's request for review,  
5 making the written decision by the ALJ the final agency decision subject to judicial  
6 review (Tr. 1-5). See 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court  
7 seeking judicial review of the ALJ's written decision (see ECF No. 1). On November 22,  
8 2011, defendant filed the sealed administrative record ("Tr.") regarding this matter (see  
9 ECF Nos. 9, 10). In plaintiff's Opening Brief, plaintiff challenges the ALJ's finding that  
10 plaintiff's left humeral malunion was not a severe impairment and the ALJ's subsequent  
11 consideration of plaintiff's symptoms resulting from this alleged severe impairment (see  
12 ECF No. 11, p. 1).

#### 14 STANDARD OF REVIEW

15 Plaintiff bears the burden of proving disability within the meaning of the Social  
16 Security Act (hereinafter "the Act"). Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir.  
17 1999); see also Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995). The Act defines  
18 disability as the "inability to engage in any substantial gainful activity" due to a physical  
19 or mental impairment "which can be expected to result in death or which has lasted, or  
20 can be expected to last for a continuous period of not less than twelve months." 42 U.S.C.  
21 §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the Act only if plaintiff's  
22 impairments are of such severity that plaintiff is unable to do previous work, and cannot,  
23 considering the plaintiff's age, education, and work experience, engage in any other  
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1 substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A),  
2 1382c(a)(3)(B); see also Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

3 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's  
4 denial of social security benefits if the ALJ's findings are based on legal error or not  
5 supported by substantial evidence in the record as a whole. Bayliss v. Barnhart, 427 F.3d  
6 1211, 1214 n.1 (9th Cir. 2005) (*citing* Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir.  
7 1999)). “Substantial evidence” is more than a scintilla, less than a preponderance, and is  
8 such ““relevant evidence as a reasonable mind might accept as adequate to support a  
9 conclusion.”” Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting* Davis v.  
10 Heckler, 868 F.2d 323, 325-26 (9th Cir. 1989)); see also Richardson v. Perales, 402 U.S.  
11 389, 401 (1971). Regarding the question of whether or not substantial evidence supports  
12 the findings by the ALJ, the Court should ““review the administrative record as a whole,  
13 weighing both the evidence that supports and that which detracts from the ALJ’s  
14 conclusion.”” Sandgathe v. Chater, 108 F.3d 978, 980 (1996) (per curiam) (*quoting*  
15 Andrews, supra, 53 F.3d at 1039).

16  
17 In addition, the Court must independently determine whether or not ““the  
18 Commissioner’s decision is (1) free of legal error and (2) is supported by substantial  
19 evidence.”” See Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2006) (*citing* Moore v.  
20 Comm’r of the Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002)); Smolen v. Chater,  
21 80 F.3d 1273, 1279 (9th Cir. 1996). In the context of social security appeals, legal errors  
22 committed by the ALJ may be considered harmless where the error is irrelevant to the  
23 ultimate disability conclusion when considering the record as a whole. Molina v. Astrue,  
24

1 2012 U.S. App. LEXIS 6570 at \*24-\*26, \*32-\*36, \*45-\*46 (9th Cir. April 2, 2012)  
2 (Dock. No. 10-16578); see also 28 U.S.C. § 2111; Shinsheki v. Sanders, 556 U.S. 396,  
3 407 (2009); Stout v. Commissioner, Social Security Administration, 454 F.3d 1050,  
4 1054-55 (9th Cir. 2006).

### 5 DISCUSSION

- 6 1. The ALJ did not commit harmful error when he found that plaintiff's left  
7 humeral malformation was not a severe impairment.  
8

9 Step-two of the administration's evaluation process requires the ALJ to determine  
10 whether or not the claimant "has a medically severe impairment or combination of  
11 impairments." Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation omitted);  
12 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (1996). The Administrative Law Judge  
13 "must consider the combined effect of all of the claimant's impairments on her ability to  
14 function, without regard to whether each alone was sufficiently severe." Smolen, supra,  
15 80 F.3d at 1290 (citations omitted).

16 Here, the ALJ found that plaintiff had the severe impairment of status-post lumbar  
17 fusion, therefore, step two of the sequential disability evaluation process was resolved in  
18 plaintiff's favor (see Tr. 17). However, the ALJ found that plaintiff's left humeral  
19 malunion was not a severe impairment (see Tr. 18).

20 An impairment is "not severe" if it does not "significantly limit" the ability to  
21 conduct basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). Basic work  
22 activities are "abilities and aptitudes necessary to do most jobs," including, for example,  
23 "walking, standing, sitting, lifting, pushing, pulling, reaching, carrying [and] handling."  
24

1 20 C.F.R. § 404.1521(b). “An impairment or combination of impairments can be found  
2 ‘not severe’ only if the evidence establishes a slight abnormality that has ‘no more than a  
3 minimal effect on an individual[’]s ability to work.’” Smolen, *supra*, 80 F.3d at 1290  
4 (*quoting* Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988)).

5       According to Social Security Ruling 96-3b, “[a] determination that an individual’s  
6 impairment(s) is not severe requires a careful evaluation of the medical findings that  
7 describe the impairment(s) (*i.e.*, the objective medical evidence and any impairment-  
8 related symptoms), and an informed judgment about the limitations and restrictions the  
9 impairments(s) and related symptom(s) impose on the individual’s physical and mental  
10 ability to do basic work activities.” SSR 96-3p, 1996 SSR LEXIS 10 at \*4-\*5 (*citing* SSR  
11 96-7p); *see also* Slayman v. Astrue, 2009 U.S. Dist. LEXIS 125323 at \*33-\*34 (W.D.  
12 Wa. 2009). If a claimant’s impairments are “not severe enough to limit significantly the  
13 claimant’s ability to perform most jobs, by definition the impairment does not prevent the  
14 claimant from engaging in any substantial gainful activity.” Bowen, *supra*, 482 U.S. at  
15 146.  
16

17       Plaintiff bears the burden to establish by a preponderance of the evidence the  
18 existence of a severe impairment that prevented performance of substantial gainful  
19 activity and that this impairment lasted for at least twelve continuous months. 20 C.F.R.  
20 §§ 404.1505(a), 404.1512, 416.905, 416.1453(a), 416.912(a); Bowen, *supra*, 482 U.S. at  
21 146; *see also* Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998) (*citing* Roberts v.  
22 Shalala, 66 F.3d 179, 182 (9th Cir. 1995)). It is the claimant’s burden to “‘furnish[] such  
23 medical and other evidence of the existence thereof as the Secretary may require.’”  
24

1 Bowen, supra, 482 U.S. at 146 (*quoting* 42 U.S.C. § 423(d)(5)(A)) (*citing* Mathews v.  
2 Eldridge, 424 U.S. 319, 336 (1976)); see also McCullen v. Apfel, 2000 U.S. Dist. LEXIS  
3 19994 at \*21 (E.D. Penn. 2000) (*citing* 42 U.S.C. § 405(g); 20 C.F.R. §§ 404.1505,  
4 404.1520) (“Plaintiff failed to adduce medical evidence that would support a finding that  
5 he was precluded from engaging in basic work activities for a continuous twelve-month  
6 period, a fatal omission”).

7  
8         However, the “severity regulation does not change the settled allocation of  
9 burdens of proof in disability proceedings . . . . the [defendant Commissioner] bears  
10 the burden of proof at step five, which determines whether the claimant is able to perform  
11 work available in the national economy.” Bowen, supra, 482 U.S. at 146 n.5. Here, steps  
12 one through four did not lead to a finding of not disabled, and this matter proceeded to a  
13 determination of plaintiff’s residual functional capacity and to the subsequent step five  
14 determination that plaintiff was able to perform work available in the national economy  
15 (see Tr. 17-24).

16         The ALJ included the following analysis in his written decision regarding  
17 plaintiff’s alleged severe impairment of left humeral malunion:

18                 The record also shows that the claimant’s left arm was broken in the  
19 January 2007 motor vehicle accident. At the hearing, the claimant  
20 testified that she is unable to use her left arm to pick up her young  
21 children. In April 2009, orthopedic physician, Alan Thomas, MD  
22 examined the claimant’s left arm and reviewed two x-ray images. Dr.  
23 Thomas noted that while there was a malunion of the humeral bone, it  
24 was a well-healed fracture and it was likely not the cause of the  
claimant’s reported pain, and ordered an EMG. The record is notably  
absent of a follow-up EMG, and in subsequent records, the claimant does  
not refer to any pain or functional limitations in her left arm.

1 Accordingly, the claimant's left arm pain, status-post fracture, is a  
2 nonsevere impairment.

3 (Tr. 18).

4 First, the Court notes that the ALJ's finding that "in subsequent records, the  
5 claimant does not refer to any pain or functional limitations in her left arm" (*id.*) is not  
6 accurate. On September 3, 2009, plaintiff's treatment records indicated that she sought a  
7 second opinion regarding her arm pain because Dr. Thomas would not do surgery (*see* Tr.  
8 457).

9 Dr. Thomas assessed that plaintiff suffered from left "upper extremity pain with a  
10 left humeral malunion" (Tr. 427). Regarding Dr. Thomas's plan on how to deal with  
11 plaintiff's pain with a humeral malunion, he indicated his opinion that "addressing the  
12 humeral malunion would [not] improve [plaintiff]'s pain" (*id.*). Dr. Thomas also  
13 indicated that some of plaintiff's pain "may involve nerve etiology" (*id.*).  
14

15 Regarding the ALJ's reliance on Dr. Thomas's opinion, Dr. Thomas's opinion  
16 does not demonstrate conclusively that plaintiff's left humeral malunion was not a severe  
17 impairment. However, it also does not demonstrate conclusively that plaintiff's humeral  
18 malunion was a severe impairment, and it is plaintiff's burden to establish by a  
19 preponderance of the evidence the existence of a severe impairment that prevented  
20 performance of substantial gainful activity. Ultimately, it is plaintiff's burden to  
21 "furnish[] such medical and other evidence of the existence thereof as the Secretary may  
22 require.'" *See Bowen, supra*, 482 U.S. at 146 (*quoting* 42 U.S.C. § 423(d)(5)(A)) (*citing*  
23  
24



1 | Mathews, *supra*, 424 U.S. at 336); 20 C.F.R. §§ 404.1505(a), 404.1512, 416.905,  
2 | 416.1453(a), 416.912(a).

3 | Plaintiff has not directed the Court to any evidence other than plaintiff's  
4 | testimony, *see infra*, that suggests that her left humeral malunion had “more than a  
5 | minimal effect on [her] ability to work.” *See Smolen*, *supra*, 80 F.3d at 1290 (*quoting*  
6 | *Yuckert*, *supra*, 841 F.2d at 306). Therefore, plaintiff has not met her step two burden to  
7 | demonstrate that this impairment was severe. *See Bowen*, *supra*, 482 U.S. at 146; *see also*  
8 | *Smolen*, *supra*, 80 F.3d at 1290 (*quoting Yuckert*, *supra*, 841 F.2d at 306).

9 |  
10 | Even if the ALJ incorrectly determined that plaintiff's left humeral malunion was  
11 | not a severe impairment, there was no harmful error. *See Burch v. Barnhardt*, 400 F.3d  
12 | 676, 682 (9th Cir. 2005) (per curiam) (“Assuming without deciding that this omission [to  
13 | find an impairment severe] constituted legal error, it could only have prejudiced  
14 | [plaintiff] in step three (listing impairment determination) or step five (RFC) because the  
15 | other steps, including this one, were resolved in her favor”). Here, plaintiff does not reply  
16 | to defendant's argument that plaintiff “does not claim any specific limitations were  
17 | excluded from the RFC finding as a result of the ALJ not labeling plaintiff's left arm  
18 | pain, status post fracture as a severe impairment” (Response, ECF No. 12, p. 5).

19 | Plaintiff has not argued that her left humeral malunion was a listing level  
20 | impairment (step three). In addition, here, just like the plaintiff in *Burch*, plaintiff “has  
21 | not pointed to any evidence of functional limitations” as a result of her left humeral  
22 | malunion that would have impacted the ALJ's analysis. *See id.* at 683-84.  
23 |  
24 |

1 Dr. Thomas does not appear to have opined that plaintiff's left humeral malunion  
2 resulted in any particular functional limitations on plaintiff's ability to perform work  
3 related activities. In fact, Dr. Thomas opined that plaintiff had "gone on to have excellent  
4 healing of the humerus" (Tr. 427). The Court notes that he also indicated his objective  
5 observation that plaintiff demonstrated "good strength of the extensors of the left wrist .  
6 . . . [and] acceptable motion of the left elbow as well as acceptable motion of the left  
7 shoulder" (id.).

8  
9 As Dr. Thomas noted plaintiff's normal strength and range of motion, it appears  
10 from the record that the only potential limitation mentioned by Dr. Thomas regarding  
11 plaintiff's left humeral malunion was due to plaintiff's pain. The ALJ specifically  
12 discredited plaintiff's testimony and credibility regarding the severity of her alleged  
13 symptoms, and plaintiff has not challenged this finding by the ALJ (see Tr. 19-21). In  
14 addition, even if a claimant "has an ailment reasonably expected to produce *some* pain;  
15 many medical conditions produce pain not severe enough to preclude gainful  
16 employment." See Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989) (*citing* 42 U.S.C. §  
17 423(d)(5)(A)).

18 Although plaintiff argues that "the ALJ obviously made no associated residual  
19 functional capacity findings at step 4" regarding plaintiff's left humeral malunion,  
20 plaintiff fails to inform the Court which particular limitation the ALJ failed to consider  
21 properly (see Opening Brief, ECF No. 11, p. 5). See also Burch, supra, 400 F.3d at 684  
22 (plaintiff "has not set forth, and there is no evidence in the record, of any functional  
23 limitations as a result of her [allegedly improperly considered diagnosis] that the ALJ  
24

1 failed to consider”). As in Burch, here, there does not appear to be any evidence in the  
2 record of any functional limitations resulting from plaintiff’s left humeral malunion that  
3 the ALJ failed to consider properly. See Burch, *supra*, 400 F.3d at 684.

4  
5 Similarly, although plaintiff argues that “it is logical to form a judgment that the  
6 plaintiff’s left humeral malunion imposes more than a ‘minimal effect’ on basic work  
7 activities” (Opening Brief, ECF No. 11, p. 5), it is plaintiff’s burden to “‘furnish[] such  
8 medical and other evidence of the existence thereof as the Secretary may require.’”  
9 Bowen, *supra*, 482 U.S. at 146 (*quoting* 42 U.S.C. § 423(d)(5)(A)) (*citing Mathews*,  
10 *supra*, 424 U.S. at 336); 20 C.F.R. §§ 404.1505(a), 404.1512, 416.905, 416.1453(a),  
11 416.912(a). If it is so logical for such a judgment to be formed, one would expect to find  
12 such an opinion in the record from plaintiff’s examining doctors. There is none.

13 For the reasons stated and based on the relevant record, the Court concludes that  
14 the ALJ did not commit harmful error in finding that plaintiff’s left humeral malunion  
15 was not a severe impairment. Plaintiff has not demonstrated that this impairment had  
16 more than a minimal effect on her ability to work. The Court also finds that even if the  
17 ALJ’s step two finding regarding plaintiff’s humeral malunion was erroneous, there was  
18 no harmful error.  
19

20 2. The ALJ’s finding regarding plaintiff residual functional capacity (“RFC”) is  
21 based on substantial evidence in the record as a whole.  
22

23 The ALJ indicated that he had “considered all symptoms” when making the  
24 determination regarding plaintiff’s residual functional capacity and plaintiff has not

1 directed the Court to any evidence in the record demonstrating otherwise. Although the  
2 ALJ erred when determining that plaintiff failed to mention arm pain subsequent to the  
3 evaluation by Dr. Thomas, plaintiff has not indicated how she was prejudiced by this  
4 error.

5 Furthermore, even if plaintiff's left humeral malunion was a severe impairment,  
6 plaintiff has not demonstrated that she suffered from any functional limitation on her  
7 ability to work as a result of this impairment that was not included in plaintiff's residual  
8 functional capacity ("RFC"). The Court notes that the ALJ gave "substantial weight" to  
9 an examining doctor's opinion (Dr. Andrea Opalenik, D.O.) which the ALJ found  
10 generally to be "consistent with a light residual functional capacity" (Tr. 22). Plaintiff has  
11 not challenged this finding, or the ALJ's evaluation of other doctors' opinions in the  
12 record.  
13

14 For the reasons stated and based on the record as a whole, the Court concludes that  
15 plaintiff has not demonstrated that any harm resulted from any errors in the ALJ's step  
16 two determination regarding plaintiff's severe impairments. Based on the relevant record,  
17 the Court also concludes that the ALJ's step three through step five findings, including  
18 the ALJ's finding regarding plaintiff's RFC, are based on substantial evidence in the  
19 record as a whole.  
20

### 21 CONCLUSION

22 The ALJ did not commit harmful error when making the determination that  
23 plaintiff's left humeral malformation was not a severe impairment. Plaintiff has not  
24 presented any evidence that any functional limitation on her ability to work based on this

1 impairment was disregarded improperly. Step two was resolved in plaintiff's favor, and  
2 the ALJ's findings regarding the remainder of the five-step sequential disability  
3 evaluation process are supported by substantial evidence in the record as a whole.

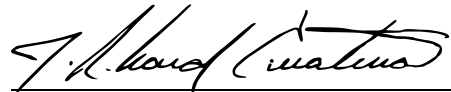
4 Based on these reasons and the relevant record, the undersigned recommends that  
5 this matter be **AFFIRMED** pursuant to sentence four of 42 U.S.C. § 405(g).

6 **JUDGMENT** should be for **DEFENDANT** and the case should be closed.

7 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
8 fourteen (14) days from service of this Report to file written objections. See also Fed. R.  
9 Civ. P. 6. Failure to file objections will result in a waiver of those objections for  
10 purposes of *de novo* review by the district judge. See 28 U.S.C. § 636(b)(1)(C).  
11

12 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the  
13 matter for consideration on June 15, 2012, as noted in the caption.

14 Dated this 22nd day of May, 2012.

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16 

17 J. Richard Creatura  
18 United States Magistrate Judge  
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